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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1017

ROBERT E. LUCAS, RALPH MIGNEREY
and R. W. JONES, SR.,
Petitioners,

versus

HENRY M. HOPE, JR., F. LAMAR FLEMING
and CHARLES T. WOLF,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE

Proceedings and Disposition in the Courts Below 4

Statement of Facts 6

Basis for Federal Jurisdiction in the Trial Court 9

REASONS FOR ALLOWANCE OF THE WRIT 9

Argument 9

CONCLUSION 14

CERTIFICATE OF SERVICE 15

APPENDIX A — Opinion of the District Court ... 1a

APPENDIX B — Opinion of the United States Court of Appeals for the Fifth Circuit 5a

APPENDIX C — Order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing and denying the petition for rehearing en banc 11a

APPENDIX D — Judgment of the United States Court of Appeals for the Fifth Circuit 12a

TABLE OF AUTHORITIES

Cases: Page

Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) 9

Goodson v. Northside Bible Church, 261 F.Supp. 99, affirmed, 5th Cir. 387 F.2d 534 (1967) 11

Hagans, et al. v. Lavine, et al., 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) 14

Kedroff, et al. v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952) 11

Mack et al. v. Kime et al., 129 Ga. 1, 58 S.E. 184 (1907) 10

Maryland and Virginia Eldership of the Churches of God, et al. v. Church of God at Sharpsburg, Inc., et al., 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970) 9,11

The Oneida Nation of New York State, et al. v. The County of Oneida, New York, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) 13

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al., 225 Ga. 259, 167 S.E.2d 658 (1969) 10,12-13

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 658 (1969) 10,13

TABLE OF AUTHORITIES (Continued)

Page

Sapp et al. v. Callaway et al., 210 Ga. 277, 79 S.E.2d 532 (1954) 10

Taylor v. Anderson, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914) 12

Watson v. Jones, 13 Wall 679, 20 L.Ed. 666 (1872) 9,10,12

Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) 12

Statutes and Other Authorities:

Constitution of the United States
First Amendment 3,4,9,11,12,13
Fourteenth Amendment 3,9

Federal Rules of Civil Procedure
Rule 12 5

Georgia Statutes
Section 22-406 13
Section 22-504 4,10,13

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IN THE
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ROBERT E. LUCAS, RALPH MIGNEREY
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully show in support of their Petition the following:

OPINIONS BELOW

The opinion of the District Court is not reported and is attached hereto as Appendix A.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 515 F.2d 234 and is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 30, 1975. A timely petition for rehearing and suggestion for rehearing en banc was filed in said Court.

The order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing and denying the petition for rehearing en banc was entered October 23, 1975, and is attached hereto as Appendix C. Judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 31, 1975, and is attached hereto as Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the United States District Court have jurisdiction pursuant to 28 U.S.C. 1331 of an action brought by members of the congregation of a local Presbyterian Church who remain loyal to The Presbyterian Church in the United States against those members of the congregation who withdrew from said denomination yet remain in possession of the church property where the complaint seeks a declaration that a statute of the State of Georgia affording color for the actions of the defendants violates the religion section of the First Amendment to the Constitution of the United States.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. 1331 is as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The applicable portion of the First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

The applicable portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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The applicable Georgia statute is an Act of the General Assembly of Georgia, 1968 Session, pp. 565,822. The relevant portion is codified as Section 22-5504 in Chapter 22-55 "Churches, Religious and Fraternal Societies and Schools" in the Corporation Code of Georgia and reads as follows:

> "22-5504. The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of a congregation from the original body, or uniting with another church or denomination, is a relinquishment of all rights in the church abandoned."

STATEMENT OF THE CASE

Proceedings and Disposition in the Courts Below.

Plaintiffs as representatives of the class of the congregation of Vineville Presbyterian Church who remained loyal to The Presbyterian Church in the United States filed their complaint in the United States District Court for the Middle District of Georgia, Macon Division, on February 1, 1974. The defendants are representatives of the class of the congregation who formally withdrew from The Presbyterian Church in the United States but who continue to possess and exercise dominion over the Church Sanctuary and other Church property. The complaint sought a declaration that the Georgia Statute set forth above violated the religion section of the First Amendment and further sought an injunction against the

defendants' continued possession of and dominion over the Church Sanctuary and other Church property.

Defendants electing prior to answer to move under Rule 12 of the Federal Rules of Civil Procedure filed a motion to dismiss which included lack of Federal jurisdiction as one of its grounds.

Written briefs were submitted by the parties and the District Court entered an order on March 25, 1974, postponing a decision on the motions until the trial on the merits. The answer of defendants was filed on April 3, 1974.

After the answer was filed but without reception of additional briefs and without any hearing, either legal or evidentiary, the District Judge sua sponte entered an order on August 2, 1974, dismissing the complaint for want of Federal jurisdiction. Judgment was entered thereon and appeal to the United States Court of Appeals for the Fifth Circuit followed.

The case was argued orally and on June 30, 1975, the Circuit Court entered an opinion, authored by Associate Judge Skelton of the United States Court of Claims sitting by designation and joined by Circuit Judges Godbold and Gee, affirming the judgment of the District Court. A timely petition for rehearing and suggestion for en banc consideration was filed and was denied without opinion on October 23, 1975.

Statement of Facts.

The Presbyterian Church in the United States is a hierarchical Church with a connectional form of government. The local unit of the Church which is the congregation is governed by its Session, the Session is in turn governed by the Presbytery, the Presbytery governed by the Synod, and the Synod by the General Assembly which governs all subordinate Church units in the United States. Certain governmental units in this structure are specifically designated as Church Courts and any of the Church Courts are authorized to appoint a Commission to perform their functions.

There is a local unit of The Presbyterian Church in the United States known as Vineville Presbyterian Church located in Macon, Georgia. This church was established as a unit of The Presbyterian Church in the United States by action of the Presbytery of Macon on April 29, 1904.

On May 27, 1973, there was submitted to the congregation of the Vineville Presbyterian Church a resolution to withdraw the said church from The Presbyterian Church in the United States. At this meeting of the congregation, after a proposal for secret ballot was defeated, the congregation voted 165 for the resolution of withdrawal and 94 against the resolution. During the discussion at this meeting, a question was raised from the floor as to what percentage of a majority was required to pass the resolution; the moderator advised that a simple majority was sufficient.

After the passage of the resolution of withdrawal, the Presbytery of Macon-Augusta, the Church Court of The Presbyterian Church in the United States with immediate jurisdiction over the local Church unit, was notified by the secretary of the withdrawing group and the minister (the defendant Hope) of their withdrawal from the jurisdiction of The Presbyterian Church in the United States.

On June 26, 1973, a duly authorized Commission of The Presbyterian Church in the United States issued its ruling and judgment on the actions of the defendants and the class they represent; this ruling and judgment decreed that defendants and the class they represent were no longer officers or members of The Presbyterian Church in the United States and that plaintiffs and the class that they represent were the true congregation of the Vineville Presbyterian Church. No appeal was taken by defendants or any member of their class to any higher Church Court in The Presbyterian Church in the United States.

Defendants and the class that they represent have since that time continued to maintain possession and control of the Church Sanctuary and the other Church property.

Plaintiffs contend that the Georgia statute, Code Section 22-5504, is violative of the religion section of the First Amendment to the Constitution of the United States.

In their answer to the complaint, defendants say the following:

> "Paragraph 16 . . . defendants say that the majority of the congregation of the Vineville Presbyterian Church has continued in possession of the Church edifice at 2193 Vineville Avenue, and does so rightfully. In this connection, these defendants allege that the control of the property in question is vested in the majority of the congregation and that they are entitled to continue to possess it and exercise dominion over it."

Despite this explicit language, defendants have steadfastly maintained in briefs and oral argument in the Circuit Court that they do not rely on the offending statute. They have yet, however, to advance any basis for their assertion that control of the Church property is legally vested in the majority of the congregation.

The District Court, impressed that plaintiffs had not prior to filing this action sought to evict the defendants from the Church property in the Courts of Georgia found no actual case or controversy. The opinion of the Circuit Court agreed that there is no actual case or controversy as to the Georgia statute saying at page 236 of its opinion: "This is especially true in view of the fact that defendants say they are not relying on the statute." The Circuit Court also felt (page 236) that the action was essentially a suit for title and possession of real estate and that the attack on the Georgia statute was in anticipation or avoidance of a defense and hence did not suffice to establish Federal question jurisdiction.

Basis for Federal Jurisdiction in the Trial Court.

The complaint sets forth a well pleaded Federal question pursuant to 28 U.S.C. 1331 in that it seeks a declaration that a statute of the State of Georgia which affords color to the actions of defendants violates the religion section of the First Amendment to the Constitution of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals has rendered an opinion involving an important branch of Federal jurisdiction which is in conflict with applicable decisions of this Court.

Argument

The First Amendment is made applicable to State action by the Fourteenth Amendment. *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

In the troublesome area of contests concerning church property, there are several allowable approaches which are consistent with First Amendment rights and prohibitions. See concurring opinion in *Maryland and Virginia Eldership of the Churches of God, et al.* v. *Church of God at Sharpsburg, Inc., et al.*, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970).

One is that the States may follow *Watson* v. *Jones*, 13 Wall 679, 20 L.Ed. 666 (1872) and enforce the property

decisions made within a church of hierarchical polity by duly constituted church authority provided that such determination can be made without the resolution of doctrinal questions and without extensive inquiry into religious polity.

Georgia traditionally follows the *Watson* v. *Jones* approach. *Mack et al.* v. *Kime et al.*, 129 Ga. 1, 58 S.E. 184 (1907); *Sapp et al.* v. *Callaway et al.*, 210 Ga. 277, 79 S.E.2d 532 (1954).[1]

Another constitutionally permissible approach is the application of neutral principals of general property and corporation law. Such are not applicable in the instant litigation. The terms and conditions of the relevant deeds and conveyances affecting the subject property are not significant. Nor do the general provisions of the Georgia Non-Profit Corporation Code apply to this situation since the State as set forth above has legislated specifically in the Corporation Code as to Churches and Religious Societies.

Finally, the States may pass special statutes governing church property arrangements. This Georgia has done by enacting Section 22-5504 as set forth above.

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1 Defendants contend that the Supreme Court of Georgia in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al.*, 225 Ga. 259, 167 S.E.2d 658 (1969) discarded the *Watson* v. *Jones* approach. In this case which considered the Georgia litigation on remand from this Court after its decision in *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 658 (1969), the Supreme Court of Georgia dealt with the Georgia implied trust theory in the light of this Court's reversal. It did not, either directly or impliedly, discard the *Watson* v. *Jones* approach.

Such statutes must be carefully drawn to leave ecclesiastical polity as well as doctrine to church governing bodies.[2]

State statutes which interfere with ecclesiastical polity and doctrine offend the First Amendment and have been declared void. *Kedroff, et al.* v. *Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952).

The Georgia statute clearly authorizes the majority of the congregation to control the church. It authorizes the congregation acting as a legislative body by majority vote to change established systems of church ownership without regard to church governing bodies and to the detriment of the minority and further to alter established doctrine without regard to church governing bodies. This violates the religion section of the First Amendment.

The Circuit Court did not, however, come to grips with this Constitutional issue. Rather it was impressed, as was the District Court, with the fact that neither the plaintiffs nor the parent church had made any efforts in the Georgia Courts to evict the defendants from the church property. This seems at total

2 In the concurring opinion in *Eldership* v. *Church of God at Sharpsburg*, supra, footnote 5 (p. 370) refers in this connection to *Goodson* v. *Northside Bible Church*, 261 F.Supp. 99, which was affirmed by the Fifth Circuit in 387 F.2d. 534 (1967). This case dealt with a First Amendment attack on an Alabama statute which allowed control to 65% of the congregation. Federal question jurisdiction was not questioned and the statute was declared in violation of the religion section of the First Amendment. This case was cited in the briefs of Petitioners and argued orally in the instant litigation. It was not, however, mentioned in the Court's opinion.

variance with the duality of our legal system for cases of this kind as enunciated by this Court in *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).[3]

The Circuit Court seemed further impelled to its decision by the fact that the defendants contended both in brief and oral argument that they did not rely on the Georgia statute for their position. While it is clearly established that matters in anticipation or avoidance of possible defenses may not be relied on to establish Federal question jurisdiction, *Taylor* v. *Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914), surely the converse must be true. A disclaimer by defendants of specific reliance on a constitutionally impermissible statute which is clearly relevant and material to the issues in the litigation should not defeat Federal question jurisdiction.

We think it patent were it not for this statute, which stands athwart the First Amendment rights of the plaintiffs, that under the record in this case *Watson* v. *Jones* would apply and the plaintiffs would already have long since been in possession of the Church Sanctuary and the other Church property. The disclaimer of the defendants cannot change the fact that the statute is on the books as a State sanctioned direction for the handling of church property disputes.[4]

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3 There is no suggestion in the opinion of the Circuit Court that the doctrine of abstention so as to allow a construction of the statute by the Georgia Courts should apply. Indeed the language of the statute is so clear that such would not seem to be a viable alternative.

4 Defendants have contended that the statute applies only to congregational churches. The language of the statute makes clear that such is not so; no Georgia case has so held. Indeed, the Supreme Court of Georgia in the first appearance of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial*

Finally, the Circuit Court concluded that the plaintiffs' action is essentially a suit for title and possession of real estate and since they found no Federal question the issues must be decided under State law and in a State court. This holding is, we submit, in conflict with *The Oneida Nation of New York State, et al.* v. *The County of Oneida, New York*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). This case involved the right of possession of certain lands which had formerly been part of the Oneida Indian Nation. This Court held that while the action was essentially a possessory action involving land, it presented a Federal question since Indian titles are matters of Federal law. The analogy to the instant case is clear. All of our citizens are entitled to practice their religion unhampered by State statutes which violate the religion section of the First Amendment. These are rights which arise under the Constitution of the United States and are guaranteed by it. The Federal question in the instant case is well pleaded and complies in every respect with applicable criteria for Federal question jurisdiction under the provisions of 28 U.S.C. 1331.

The fact that plaintiffs, in addition to the substantial Constitutional issue presented, seek an injunction to prevent defendants from further possessing or claiming title to the church property is no cause to

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Presbyterian Church, et al., 224 Ga. 61, 71, 159 S.E.2d 690 (1968) (subsequently reversed by this Court in *Presbyterian Church in the United States, et al.* v. *Mary Elizabeth Blue Hull Presbyterian Church, et al.*, supra) comments that the litigation there was between the local churches and the general church and not between two factions of the local church which latter type of litigation would be governed by Georgia Code Section 22-406, the identical predecessor of Georgia Code Section 22-5504.

deny Federal jurisdiction. *Hagans, et al.* v. *Lavine, et al.*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the opinion of the Circuit Court herein is in conflict with applicable decisions of this Court and that it justifies review by certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John B. Harris, Jr., one of counsel for the Petitioners, do certify that I have served the foregoing Petition for Certiorari upon the Respondents by depositing copies of the same in the United States mail, adequate postage prepaid, to their counsel of record as follows:

Edward S. Sell, Jr., Esq.
Georgia Power Building
Macon, Georgia 31201

Wallace Miller, Jr., Esq. and
W. Warren Plowden, Jr., Esq.
First National Bank Building
Macon, Georgia 31201

This ____ day of January, 1976.

_____

John B. Harris, Jr.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ROBERT E. LUCAS, ET AL.,
Plaintiffs,

versus C.A. No. 74-20-MAC

HENRY M. HOPE, JR., ET AL.,
Defendants.

Filed: Aug. 2, 1974

OWENS, District Judge:

Robert E. Lucas, Ralph Mignerey and R. W. Jones, Sr., individually and in behalf of a class consisting of persons who are the true congregation of Vineville Presbyterian Church, filed their complaint alleging that they by virtue of a Georgia Law[1] which is repugnant to the Constitution of the United States, are being unlawfully deprived of possession of the church property located at 2193 Vineville Avenue, Macon, Bibb

1 1968 Ga. Laws 565, 822, informally codified as 1933 Georgia Code Annotated 22-5504 provides:

"Majority represent church. Withdrawal by part of congregation. — The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of a congregation from the original body, or uniting with another church or denomination, is a relinquishment of all rights in the church abandoned. (Acts 1968, pp. 565, 822)"

County, Georgia, known and identified as the Vineville Presbyterian Church. While plaintiffs claim deprivation of possession, they do not allege that they or the parent church have made any effort in the courts of the State of Georgia to evict the defendants from the said Vineville Presbyterian Church property. They do not say they have demanded possession and that defendants relying on the alleged unconstitutional law, refuse to surrender to them. Instead, they seem to say that they anticipate that if they seek to evict the defendants in the courts of the State of Georgia, the defendants will defend on the basis of the alleged unconstitutional law and the courts of the State of Georgia will refuse to evict the defendants on the basis thereof.

Under Article III of the Constitution of the United States the jurisdiction of United States District Courts is limited to actual cases or controversies. *O'Shea, Magistrate* v. *Littleton*, ___ U.S. ___, 38 L.Ed 2d 674, 94 S.Ct. ___ (January 15, 1974). Assuming the facts as stated by the plaintiffs to be true, their complaint does not show an actual case or controversy. It is merely anticipatory. This court does not therefore have jurisdiction of this complaint.

Even if the parties were attempting to proceed in the courts of the State of Georgia to resolve their differences and even if the courts of the State of Georgia were relying upon an alleged unconstitutional statute of this state to deny the plaintiffs possession of this church, the court still would not have jurisdiction. As the United States Court of Appeals for the Fifth Circuit recently stated in *Simpson* v. *Wells Lamont Corp., et*

al., ___ F.2d ___, (May 24, 1975), No. 73-1026, Slip Opinion p. 4085:

> "This case involves the fundamental question of who will preach from the pulpit of a church and will will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church. The District Court dismissed this civil rights suit brought by a pastor for damages for his ouster by church officials. As if the long history of separation of ecclesiastical courts and civil courts prior to and since the founding of this country were not sufficient to ground an affirmance, the first words of the Bill of Rights in the United States Constitution would clearly establish the unconstitutionality of any law asserted on behalf of the plaintiff: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' Certainly a congregation's determination as to who shall preach from the church pulpit is at the very heart of the free exercise of religion, which plaintiffs would corrode with an overlay of civil rights legislation and other parts of the Constitution. The people of the United States conveyed no power to Congress to vest its courts with jurisdiction to settle purely ecclesiastical disputes." *Id.* at 4088.

Because of the absence of jurisdiction in this court, defendants' motion to dismiss for lack of jurisdiction is hereby granted and said complaint is hereby dismissed.

SO ORDERED, this the 2nd day of August, 1974.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
United States District
Judge

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APPENDIX B

Robert E. LUCAS, Ralph Mignerey and
R. W. Jones, Sr.,
Plaintiffs-Appellants,

versus

Henry M. HOPE, Jr., F. Lamar Fleming
and Charles T. Wolf,
Defendants-Appellees.

No. 74-3349.

United States Court of Appeals,
Fifth Circuit.

June 30, 1975

Rehearing and Rehearing En Banc
Denied Oct. 23, 1975

Appeal from the United States District Court for the Middle District of Georgia.

Before GODBOLD, Circuit Judge, SKELTON, Associate Judge,* and GEE, Circuit Judge.

SKELTON, Associate Judge:

This case involves a dispute as to the title and possession of church property. A controversy arose among the members of the congregation of the Vineville Presbyterian Church, located in Macon, Georgia, and on May 27, 1973, a resolution was adopted by

* Of the U.S. Court of Claims, sitting by designation.

BLEED THROUGH

the congregation by a vote of 165 to 94 to withdraw from the Presbyterian Church in the United States, with which the Vineville Church had been affiliated since 1904. The minister, defendant Hope, was one of the withdrawing members. Those who voted against the resolution, including the plaintiffs Lucas, et al., remained in the church and now claim to be the true congregation of the Vineville Church.

The Presbyterian Church in the United States is a hierarchial church with a connectional form of government. The local church unit is governed by its Session, the Session by the Presbytery, the Presbytery by the Synod, and the Synod by the General Assembly which governs all local church units, Presbyteries and Synods in the United States. The Presbytery, Synod and General Assembly are specifically designated in the Book of Church Order as Church Courts.

The Presbytery of Augusta-Macon, the Church Court of the Presbyterian Church in the United States having immediate jurisdiction over the Vineville Church, was notified immediately after the passage of the resolution that defendant Hope and those associated with him had withdrawn from the Presbytery of Augusta-Macon and the Presbyterian Church in the United States. Thereafter, on or about June 26, 1973, the Augusta-Macon Presbytery, acting through its duly constituted Administrative Commission, issued a ruling to the effect that defendants and the class they represent are no longer officers or members of the Presbyterian Church in the United States and "have forfeited all ecclesiastical privileges of the PCUS and all rights to the property of the Congregation," and that the plaintiffs and the class they represent who re-

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mained loyal "are recognized and are hereby declared to be the true congregation of Vineville Presbyterian Church." No appeal was taken from this ruling by defendants or any member of the class they represent to any higher Church Court in the Presbyterian Church in the United States. Notwithstanding this ruling and decision, defendant Hope and the other withdrawing members aforesaid have remained in exclusive possession of the Vineville Church building, appurtenances and assets.

The plaintiffs, Robert E. Lucas, Ralph Mignerey, and R. W. Jones, Sr., individually and in behalf of a class consisting of persons who are the true congregation of the Vineville Presbyterian Church, as recognized and decreed by the Augusta-Macon Presbytery of the Church, filed their complaint in the United States District Court for the Middle District of Georgia against Henry M. Hope, Jr., F. Lamar Fleming, Charles T. Wolf, and the class they represent, all of whom withdrew from the Vineville Church as described above, claiming that by virtue of Section 22-5504 of the Georgia Code Annotated, which is said to be repugnant to the Constitution of the United States, the defendants are unlawfully depriving the plaintiffs of possession of the church property located at 2193 Vineville Avenue, Macon, Georgia, known as the Vineville Presbyterian Church. The statute complained of is as follows:

> The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of the congregation from the original body, or uniting

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> with another church or denomination, is a relinquishment of all rights in the church abandoned.

The plaintiffs allege that this statute violates the first amendment to the Constitution of the United States with respect to religion. The plaintiffs seek a declaratory judgment that the above statute, and especially the first sentence thereof, is null, void, and unconstitutional and that defendants and all members of their class be enjoined from possessing and exercising dominion over the Vineville Presbyterian Church building, appurtenances and other assets of the church.

Defendants filed a motion to dismiss plaintiffs' suit on the ground of lack of jurisdiction. They contend that they are not claiming under, nor relying on, Section 22-5504 of the Georgia Code for title and possession of the church property and that the statute is not involved in this controversy in any way. They contend further that the title and possession to this property must be decided according to the laws of the State of Georgia and that the proper forum for such litigation is a state court in that State; and that there is no Federal or constitutional question involved in the present suit.

The District Court granted defendants' motion to dismiss on the ground that it lacked jurisdiction over plaintiffs' suit, saying that neither the plaintiffs nor the parent church have made any effort in the courts of the State of Georgia to evict the defendants from the church property. Furthermore, the court said that plaintiffs' complaint does not show an actual case or

controversy as to the constitutionality of Section 22-5504 of the Georgia Code and that plaintiffs' allegations in that regard are merely anticipatory of a defense they think defendants will use if plaintiffs sue in a state court. The District Court correctly held that under Article III of the United States Constitution the jurisdiction of U.S. District Courts is limited to actual cases or controversies, citing O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), and that the court does not have jurisdiction of plaintiffs' complaint because it does not allege a case or controversy as to the Georgia statute. This is especially true in view of the fact that the defendants say they are not relying on the statute. Under these facts, there is no case or controversy involving the statute, and plaintiffs' allegations with reference thereto do not confer jurisdiction on the District Court to decide their complaint. Flast v. Cohen, 392 U.S. 83, 94, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). There is no other Federal question in the case. Under these circumstances, we are not required to decide whether the Georgia statute is constitutional and we do not do so.

It is well settled that matters in anticipation or avoidance of possible defenses cannot be relied on to establish Federal question jurisdiction. Taylor v. Anderson, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914); Huckins v. Duval County, 5 Cir. 1964, 286 F.2d 46; Shelby County v. Fairway Homes, Inc., 6 Cir. 1960, 285 F.2d 617; Burat v. Board of Levee Commissioners, etc., 5 Cir. 1974, 496 F.2d 1336, and 1 Moore Federal Practice, § 0.60 (8.-3).

Simply stated, plaintiffs' case is essentially a suit for the title and possession of real estate. This is an ac-

tion at law. White v. Sparkill Realty Corp., 280 U.S. 500, 50 S.Ct. 186, 74 L.Ed. 578 (1930). Questions involving the title and possession of real estate must be decided under state law and in a state court if no Federal or constitutional question is involved. White v. Sparkill Realty Corp., *supra;* Johnson v. Byrd, 5 Cir. 1965, 354 F.2d 982, and Burat v. Board of Levee Commissioners, etc., *supra*. For example, *see* Brown v. Clark, 102 Tex. 323, 116 S.W. 360 (1909) (Title to Presbyterian church property), and Browning v. Burton, 273 S.W.2d 131 (Tex.Civ.App.1954), rehearing denied, error refused, no reversible error) (Title to Methodist church property.) There is no Federal or constitutional question in this case. It follows that the plaintiffs have filed their suit in the wrong court.

We conclude that the District Court's judgment dismissing plaintiffs' suit for lack of jurisdiction was correct.

We do not reach the question as to who has the right to occupy the church property or to preach from its pulpit. This is an ecclesiastical matter over which Federal courts have no jurisdiction. *See* Simpson v. Wells Lamont Corp., 5 Cir. 1975, 494 F.2d 490 (1975.) Neither do we decide who has title and the right to possession of the church property, as we lack authority to do so in the present posture of this case. These matters are mentioned to aid the parties in case there is further litigation over this property in a state court.

The judgment of the District Court dismissing plaintiffs' complaint is affirmed without prejudice to an action at law by plaintiffs in a state court of competent jurisdiction should they elect to file such a suit.

Affirmed.

BLEED

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

October 23, 1975

TO ALL COUNSEL OF RECORD

No. 74-3349 - Robert E. Lucas, Ralph Mignerey & R. W. Jones, Sr. vs. Henry M. Hope, Jr., F. Lamar Fleming & Charles T. Wolf

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
/s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. John B. Harris, Jr.
Mr. H T. O'Neal, Jr.
Mr. E. S. Sell, Jr.
Mr. W. Warren Plowden, Jr.

EED THROUGH

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3349

D. C. Docket No. CA-74-20MAC

ROBERT E. LUCAS, RALPH MIGNEREY and
R. W. JONES, SR.,
Plaintiffs-Appellants,

versus

HENRY M. HOPE, JR., F. LAMAR FLEMING and
CHARLES T. WOLF,
Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Georgia

Before GODBOLD, Circuit Judge, SKELTON,
Associate Judge,* and GEE, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

---

* Of the U. S. Court of Claims, sitting by designation.

Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Oct. 30, 1975

This judgment, issued as mandate, is made the judgment and order of the District Court.

This the 3rd day of November, 1975.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
U. S. District Judge

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SUPREME COURT, U. S.
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FEB 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1017

ROBERT E. LUCAS, RALPH MIGNEREY and R. W. JONES, SR.,

Petitioners,

versus

HENRY M. HOPE, JR., F. LAMAR FLEMING and CHARLES T. WOLF,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

ARGUMENT 2

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDIX A — Unreported Opinion of the Supreme Court of Georgia — Carnes v. Smith 1a

TABLE OF AUTHORITIES

Cases:

Bates v. Houston, 66 Ga. 198 (1880) 3

Bouldin v. Alexander, 15 Wall. 131, 82 U.S. 131, 21 L.Ed. 69 (1872) 4,5

Carnes v. Smith, Supreme Court of Georgia, No. 30301 (January 6, 1976) 12

Cohen v. Flast, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) 5

Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) 6

Goodson v. Northside Bible Church, 5 Cir., 1967, 387 F.2d 534 5

Heirs of Burat v. Board of Levee Commissioners of Orleans, etc., 5 Cir., 1974, 496 F.2d 1336 8

Huckins v. Duval County, 5 Cir., 1964, 286 F.2d 46 8

TABLE OF AUTHORITIES (Continued)

Page

James v. Gainey, 231 Ga. 543, 203 S.E.2d 163 (1974) 5

Johnston v. Byrd, 5 Cir., 1965, 354 F.2d 982 9

Liverpool, N.Y. & P.S.S. Co. v. Commissioners, 113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899 (1885) 6

Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970) 12

The Oneida Nation of New York State v. The County of Oneida, New York, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) 11

O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) 5

Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, 224 Ga. 61, 159 S.E.2d 690 (1968) 5

Sapp v. Callaway, 208 Ga. 805, 69 S.E.2d 734 (1952) 5

Shelby County v. Fairway Homes, Inc., 6 Cir., 1960, 285 F.2d 617 8

Sinclair v. Friedlander, 197 Ga. 797, 30 S.E.2d 398 (1944) 5

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950) 10

Taylor v. Anderson, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914) 7,11

TABLE OF AUTHORITIES (Continued)

Page

Watson v. Jones, 13 Wall. 679, 80 U.S. 679, 20 L.Ed. 666 (1872) 12

White v. Sparkill Realty Corporation, 280 U.S. 500, 50 S.Ct. 186, 74 L.Ed. 578 (1930) 9

Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) 6

Statutes:
Georgia Code 22-5504 3

Miscellaneous:
1 Moore Federal Practice § 0.60 (8.-3) 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1017

ROBERT E. LUCAS, RALPH MIGNEREY and R. W. JONES, SR.,
Petitioners,

versus

HENRY M. HOPE, JR., F. LAMAR FLEMING and CHARLES T. WOLF,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Statement of the Case set out in Petitioners' brief accurately sets forth the proceedings below in this action.

REASONS FOR DENYING THE WRIT

The Court of Appeals based its affirmance of the District Court's order dismissing the complaint on two grounds, neither of which involves any conflict with the applicable decisions of this Court with regard to Federal question jurisdiction.

ARGUMENT

I

There Is No Case Or Controversy In This Action Because Respondents Are Not Relying On The Alleged Offending Statute, And Allegations Referring To The Statute Do Not Confer Federal Question Jurisdiction.

The Court of Appeals correctly characterized this case as a suit for title and possession of real estate. As such it is based on rights and privileges derived from local property law as in any other dispute involving real estate. The circumstance here that the parties are two factions of a local Presbyterian congregation does not of its own force turn the case into one involving a Federal question or the deprivation of Constitutional rights.

In an effort to obtain adjudication of the issue in a Federal forum, petitioners set out the contention in their complaint that the respondents (who at this juncture are in possession of the disputed property) are relying upon a Georgia statute which is said to be unconstitutional by virtue of the Establishment Clause of the First Amendment. Since the moderator of the congregational meeting which passed the resolution to withdraw from the general denomination stated that a simple majority of those voting would be sufficient to adopt the resolution, the conclusion is advanced that the respondents must be relying on this particular statute.

Nevertheless, respondents stated in their answer to the complaint, at oral argument before the Court of Appeals, and now in this brief, that they do not rely on Georgia Code Section 22-504 in any manner whatsoever to establish or maintain their rightful possession of the disputed property.

Georgia Code Section 22-5504 first appeared in the Georgia Code of 1895 as Section 2360 and read as follows:

> "§ 2360. *Majority represent church.* The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of a congregation from the original body, or uniting with another church or denomination, is a relinquishment of all rights in the church abandoned."

It later became Section 2833 in the Code of 1910 and Section 22-406 of the Code of 1933. In 1968 the Georgia Corporation Code was extensively revised and modernized, but this section along with several others dealing with churches was carried forward intact with its new number.

The Code likewise indicates that as in the case of many other portions of the statute law of Georgia this section was codified from an opinion of the Supreme Court of Georgia, *Bates v. Houston*, 66 Ga. 198 (1880). That case involved a schism in the congregation of the First African Baptist Church in Savannah. After giving the background of the case including the fact that the minority portion of the congregation had seized

possession of the church building, the opinion goes on as follows:

> "The question here sought to be settled and decided, is as to the use and possession of this property — who is legally entitled to its use and enjoyment as between conflicting claimants, the representatives of these two church factions. We think the principle in this case is recognized and decided in the case of Bouldin vs. Alexander, 15 Wallace, 131. In the second head-note of that case, the court says:
>
> > '*Although a withdrawal by one part of a church congregation from the original body of it and uniting with another church or denomination, is a relinquishment of all rights in the church abandoned* . . . In a congregational church (and such it is understood the Baptist church to be) '*the majority if they adhere to the organization and doctrines represent the church.*' " 66 Ga. at 201. (emphasis added)

In the case of a Code section which has been derived from a decision of the Supreme Court of Georgia, that Court has held that its meaning is dependent upon the source:

> "When a section of the Code has been codified from a decision of this court, it will be construed in the light of the source from which it came, unless the language of the section imperatively demands a different construction."

Sinclair v. Friedlander, 197 Ga. 797, 798-99, 30 S.E.2d 398, 399 (1944).

The *Bates* decision involved a contest between two factions of a local church "*of a congregational form of government.*" It in turn was based upon *Bouldin v. Alexander*, 15 Wall. 131, 82 U.S. 131, 21 L.Ed. 69 (1872) which also involved a church with a congregational form of government.

The Supreme Court of Georgia has subsequently applied this Code section in cases involving congregational churches, for example, *James v. Gainey*, 231 Ga. 543, 203 S.E.2d 163 (1974); *Sapp v. Callaway*, 208 Ga. 805, 69 S.E.2d 734 (1952), but it was not even mentioned in any of the reported opinions in the case of *Presbyterian Church in the United States v. Eastern Heights Presbyterian Church*, 224 Ga. 61, 159 S.E.2d 690 (1968), a case which, like this one, involved a church with a connectional form of government.[1]

This Code section is therefore inapplicable to a church dispute involving a connectional denomination, its presence on the statute books of the State of Georgia cannot furnish Federal question jurisdiction, and the Court of Appeals correctly held that there is no case or controversy within the meaning of Article III. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Cohen v. Flast*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

---

1 Contrary to the suggestion advanced by petitioners on page 11 of their brief, this Code section does not give any church congregation the authority to change established systems of church property ownership as in the case of *Goodson v. Northside Bible Church*, 5 Cir., 1967, 387 F.2d 534. Moreover, an examination of the record will reveal that nothing in the Presbyterian Book of Church Order gives governing bodies other than the local church congregation any right to control local church property.

Petitioners' assertion that the result sanctioned by the Court of Appeals is at variance with the principles of law enunciated by this Court in *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967), is in error. The Court held in that case that it was error for a lower court to apply the abstention doctrine and directed that the case be considered on the merits. However, on its reappearance, *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), this Court again held the lower court to be in error because the Constitutional question must be presented "in the context of a specific live grievance", 394 U.S. at 110, and events subsequent to the first appearance of the case had a material effect on the question of justiciability:

> "No federal court, whether this Court or a district court, has 'jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*' *Liverpool, N.Y. & P. S. S. Co. v. Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). (Emphasis added.)" 394 U.S. at 110, 89 S.Ct. at 960.

As pointed out above, there is no controversy in this case with regard to Georgia Code Section 22-5504.

II

Matters In Anticipation Of A Possible Defense Cannot Be Relied On To Establish Federal Question Jurisdiction.

This Court has long adhered to the policy that a plaintiff cannot rely on possible matters of defense or

avoidance to successfully plead a claim under the general federal question jurisdiction statute. *Taylor v. Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914). As Professor Moore points out, the matter of making an allegation of general federal question jurisdiction can be easily accomplished by using the form provided in the Rules; however:

> ". . . whether the conclusion embodied in this allegation is sound often involves a difficult matter. Since the federal courts are courts of limited jurisdiction it is natural that their jurisdiction be made to appear at the time it is invoked. This means that in the case of an action commenced in the federal court and hence invoking its original jurisdiction the natural and logical principle requires the federal question to appear in the complaint well pleaded, *and not by way of anticipatory defenses* or through irrelevant, extraneous material." 1 Moore Fed. Practice § 0.60(8.-3). (emphasis added)

Moore goes on to point out that in determining whether the claim is one "arising under", the elements of the claim must be understood, and that if the action is one for the possession of real estate so that the claim is essentially ejectment, the action can seldom if ever present a case of Federal question jurisdiction.

In the case of *Taylor v. Anderson*, supra, the plaintiffs brought an action in ejectment making the usual allegations, but going further and alleging that the defendants were in possession under a void deed

because of a Federal statute restricting the transfer of land owned by certain Indian tribes. The action was dismissed on jurisdictional grounds, and this Court affirmed with this observation:

> "It is now contended that these allegations showed that the case was one arising under the laws of the United States, — namely, the acts restricting the alienation of Choctaw and Chickasaw allotments, — and therefore brought it within the circuit court's jurisdiction. But the contention overlooks repeated decisions of this court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, *unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.*" 234 U.S. 74, 34 S.Ct. 724. (emphasis added)

The principle that matters in anticipation or avoidance of possible defenses cannot be relied upon to establish Federal question jurisdiction has been consistently followed by the lower Federal Courts. See, for example, *Heirs of Burat v. Board of Levee Commissioners of Orleans, etc.*, 5 Cir., 1974, 496 F.2d 1336; *Huckins v. Duval County*, 5 Cir., 1964, 286 F.2d 46, and *Shelby County v. Fairway Homes, Inc.*, 6 Cir., 1960, 285 F.2d 617.

The petitioners' claim for relief is solely derivative from state law. They are seeking the aid of a court to put them in possession of certain real estate. The complaint alleges that the petitioners' class is the "true" congregation of the Vineville Presbyterian Church, that the respondents are in possession of the church property, and that the Court should enjoin the respondents from continuing to trespass upon this property "so that plaintiffs and the class they represent may proceed to manage and conduct the affairs and property" of the church. (¶ 19). The matter of the existence or the alleged unconstitutionality of Georgia Code Section 22-5504 is clearly not an element of their claim of right to possession of this property, but is raised solely in anticipation of a defense that petitioners contend might be raised by the respondents.

It is of no consequence that petitioners in this case have framed their complaint as an equitable action to enjoin a trespass. An action for the recovery and possession of real property is one at law, *White v. Sparkill Realty Corporation*, 280 U.S. 500, 50 S.Ct. 186, 74 L.Ed. 578 (1930), and rights and immunities with regard to the possession of property are questions of state, not federal law. *Johnston v. Byrd*, 5 Cir., 1965, 354 F.2d 982.

While the rights of the petitioners as well as all other citizens of this country with respect to freedom of religion and the other guarantees of the First Amendment clearly have their origin in the Constitution, it is equally clear that petitioners' right to the possession and use of the property in issue here does not "arise

under" the Constitution so as to entitle petitioners to evoke the Federal question jurisdiction of this Court.

Moreover, this Court has made it clear that its decisions concerning the restrictive nature of Federal question jurisdiction were not changed by the Declaratory Judgment Act. In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950), the plaintiff was seeking a declaration that a contract to provide natural gas was in effect and binding on the parties when the resolution of that question involved a construction of the Federal Power Act. The Court held that regardless of the fact that the plaintiff was only seeking a declaration of rights and not enforcement of the contract by way of specific performance or damages, its rights under the contract arose under state law governing contracts and a federal question had not been presented except in anticipation of a defense. The Court concluded with this language which we feel is particularly applicable to the case at bar:

> "To be observant of these restrictions is not to indulge in formalism or sterile technicality. It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law. Not only would this unduly swell the volume of litigation in the District Courts but it would also embarrass those courts — and this Court on

> potential review — in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State courts. To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on Federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." 339 U.S. at 673-4, 70 S.Ct. at 880.

Nevertheless, petitioners assert that the application of the well-pleaded complaint rule in this case is in conflict with the Court's decision in *The Oneida Nation of New York State v. The County of Oneida, New York*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). We would respectfully suggest, however, that this contention is likewise in error.

In *Oneida* this Court considered a possessory action brought by an Indian tribe with regard to certain land in New York. The lower courts had dismissed the complaint based on *Anderson v. Taylor*, supra, but this Court reversed and held that the well-pleaded complaint rule did not apply because the right of possession asserted was based on Federal law:

> "The threshold allegation required of such a well-pleaded complaint — the right to posses-

> sion — was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense." 414 U.S. at 666, 94 S.Ct. at 777.

The opinion of the Court reaffirms the well-pleaded complaint rule with respect to possessory actions which are based on *state* law, and the Court of Appeals correctly applied that rule in this case.

In a concurring opinion Justice Rehnquist emphasizes the position taken in the Court's opinion with regard to the well-pleaded complaint rule and states that one reason for the rule is that resolution of the Federal question will rarely dispose of the case. That is precisely the situation here. Regardless of whether respondents rely on the alleged offending statute or whether or not it is unconstitutional, the issue of who is entitled to possession of this property under Georgia real estate law still remains.

Respondents have contended from the outset that but for the alleged unconstitutional statute, it would be a simple matter for the District Court to apply the rule laid down in *Watson v. Jones*, 13 Wall. 679, 80 U.S. 679, 20 L.Ed. 666 (1872), as to connectional churches and put them in possession of the property. To the contrary, however, Georgia does not follow the formula set out in *Watson v. Jones*, supra, but has adopted the approach followed by the Court of Appeals of Maryland which was approved by this Court in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970). See *Carnes v. Smith*, Supreme

Court of Georgia, No. 30301 (January 6, 1976). (This decision is not reported, but is reproduced in the Appendix.)

CONCLUSION

For the foregoing reasons, respondents respectfully suggest that the Court of Appeals did not err in affirming the District Court, that there is no conflict with applicable decisions of this Court, and the writ should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wallace Miller, Jr., one of counsel for the Respondents, do certify that I have served the foregoing Brief upon the Petitioners by depositing copies of the same in the United States Mail, adequate postage prepaid, to their counsel of record as follows:

John B. Harris, Jr., Esq.
P. O. Box 246
Macon, Georgia 31202

H. T. O'Neal, Jr., Esq.
1000 American Federal Building
Macon, Georgia 31201

This ____ day of February, 1976.

_____

Wallace Miller, Jr.

APPENDIX

IN THE SUPREME COURT OF GEORGIA

DECIDED: Jan. 6, 1974

30301 SAM R. CARNES ET AL v. JOHN OWEN SMITH ET AL (114)

HALL, Justice.

This appeal involves a dispute over church property between the local members of the Noah's Ark Methodist, now Independent, Church and the general church, The United Methodist Church. The facts are undisputed. Noah's Ark Methodist Church was established in 1852, when the property on which the church now stands was deeded to the named individuals as "trustees of the Methodist Episcopal Church at Mount Pleasant Academy . . . their Successors in office as such forever in fee simple." From that time until 1969, the local church had continued as a connectional church of The United Methodist Church or its predecessor, the Methodist Episcopal Church. During this period, Noah's Ark had contributed funds to the parent church, had sent delegates to participate in conferences, had accepted pastors assigned to it by the general church, had held itself out as a participating member of the Methodist Church, and had been organized and functioned according to the laws and rules of The United Methodist Church and the church discipline.

The local church's dissatisfaction with the general church stemmed from the refusal of the local bishop

and district superintendent to respond to the church's 1961 resolution requesting a full time pastor. The members wished to make Noah's Ark a single rather than two-church charge that shared a pastor with a neighboring congregation. The bishop's refusal was based on the concern that such a small church, consisting of less than one hundred members, would not be able to support a full time pastor financially. The matter continued unresolved until 1969 when the local trustees voted to withdraw from the general church, and submitted a petition to that effect, signed by forty-one church members, to the Superintendent of the Griffin District. The representatives of the United Methodist Church, though they respected the right of the members to withdraw from the general church, maintained that the local church property remained part of the parent organization to which it was entrusted, and that the new Noah's Ark Methodist Church (Independent) had no right to its use or the use of the local name. However, the church members continued to use the property, and steadfastly refused to allow the superintendent to address them and to accept the new pastor assigned to their charge.

After the sheriff was called to remove the superintendent from the church one Sunday, he promised to allow the courts to resolve the property dispute. Thereafter an equitable petition was filed on behalf of The United Methodist Church by the Griffin district superintendent, the bishop, and others against the trustees of Noah's Ark from appropriating the property and name of the general church. Both parties moved for summary judgment; the trial court granted the motion of the plaintiff United Methodist Church

and enjoined the Noah's Ark trustees from any further use of the local property and the local name.

1. The defendant trustees of the Noah's Ark Church have appealed. They claim the court erred in granting the plaintiff's motion for summary judgment and denying their own based on this court's decision in *Presbyterian Church v. Eastern Heights Methodist Church*, 225 Ga. 259 (167 SE2d 658) (1969), cert. denied, 396 US 1041 (1970), where we held there was no longer an implied trust theory in Georgia. The trustees contend that without an implied trust, the property must be awarded to the legal title holders, in this case as in *Presbyterian Church*, the trustees of the local church.

The United Methodist Church, however, relies on the fact that Noah's Ark has been a connectional church from its inception in 1852 and is thus subject to the Book of Discipline, the constitution of The United Methodist Church. The discipline makes clear that church property is held by local trustees for the benefit of the general church. *Presbyterian Church*, it argues, merely holds that there is no implied trust arising solely from a connectional church relationship, and that the property should go to the local trustees only where "there [is] no other basis for a trust in favor of the general church. . . . ." 225 Ga. at 260.

It is clear and uncontroverted from the testimony and the law of the church as contained in the Book of Discipline, which is included in the record as an exhibit, that The United Methodist Church is connec-

tional or hierarchial[1] in structure. Discipline, ch. 4 at 151; United Methodist Church v. St. Louis Crossing Independent Methodist Church, 276 NE2d 916 (Ind. 1971) Trustees of Peninsula Annual Conference v. Spencer, 183 A2d 588 (Dela. 1962); Clay v. Crawford, 183 SW2d 797 (Ky. 1944). This means that the local church is a part of the whole body of the general church and is subject to the higher authority of the organization and its laws and regulations.

In Watson v. Jones, 80 U.S. (13 Wall) 679 (1871), the United States Supreme Court considered a dispute between two factions of a local church as to which group had the right to use the church property. The court ruled, although courts could not inquire into ecclesiastical questions[2] but must accept as final the rulings of the highest church judicatory on those matters,[3] that the courts were the proper fora for determining property disputes.[4] The court held that the dis-

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1 There are three basic types of church organizations recognized in Watson v. Jones, 80 U.S. (13 Wall) 679, 722-23 (1971). "The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization." See, Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952).

2 "A matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of members of the church to the standard of morals required of them." Watson v. Jones, *supra* at 733.

3 Absent a showing of fraud, collusion or arbitrariness. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929).

4 "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints." Watson v. Jones, *supra*, at 714.

puted church property therefore belonged to the local church members who adhered to the "acknowledged organism by which the body is governed. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation."[5] Watson v. Jones, supra at 725. By this principle of resolving property disputes as laid down in Watson, the law implies a trust upon the local church property for the benefit of the general church where there is a connectional relationship.[6]

The Georgia courts until 1969, however, had taken "the [English] view that such a trust is conditioned upon the general church's adherence to its tenets of faith and practice as existed when the local church affiliated with it, and that an abandonment of, or depar-

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5 The controversy before the Court over control of the church property was typical of many that arose in Kentucky and Missouri Presbyterian churches after the General Assembly of the Presbyterian Church declared itself to be anti-slavery — pledging allegiance to President Lincoln and the federal government and espousing the emancipation of slaves.

6 Justice Brennan, who wrote the Court's decision in Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church, supra, further clarified the standards to be used in his concurring opinion in Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368-70 (1970) (joined by Douglas and Marshall, J.J.). Stressing that the states could adopt any means of settling property disputes that did not involve doctrinal matters, he cautioned that the Watson approach was viable only if the relevant church governing body was easily discernible "without the resolution of doctrinal questions and without extensive inquiry into religious polity." In addition, other 'neutral principles of law,' such as "provisions in deeds or in a denomination's constitution for the reversion of local church property to the general church," could be used, again only as long as no determination of religious questions was involved. 396 U.S. at 370.

ture from, such tenets is a diversion from the trust, which the civil courts will prevent." *Presbyterian Church v. Eastern Heights Presbyterian Church*, 224 Ga. 61, 68 (159 SE2d 690) (1968), rev'd 393 U.S. 440 (1969). This court then went on to affirm in *Presbyterian Church* the trial court's judgment granting the church property to the local dissidents based on the jury's finding that the general church had "substantially abandoned" its original tenets.

The United States Supreme Court reversed stating that Georgia's departure-from-doctrine qualifications to the implied trust rule[7] violated the First Amendment by demanding an inquiry into church doctrine and practice, and that the civil courts must resolve church property ownership by employing only "*neutral principles of law*, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). (Emphasis supplied).

On remand, this court held that if the departure-from-doctrine element could "play no role in any future judicial proceedings,"[8] the "entire theory must fall."[9] *Presbyterian Church v. Eastern Heights Presbyterian Church*, 225 Ga. 259, 260 (167 SE2d 658)

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7 The Supreme Court reaffirmed the implied trust doctrine of Watson v. Jones, however. 393 U.S. at 445.

8 225 Ga. at 260 quoting 393 U.S. at 450.

9 "Since Georgia chose to adopt the implied trust theory *with* this element as a condition this court must assume that it would not have adopted the theory without this mode of protecting the local churches." 225 Ga. at 260.

(1969), cert. denied, 396 U.S. 1041 (1970). The property was awarded to the local churches based on the legal title reflected in their respective deeds.[10] "There was no other basis for a trust in favor of the general church, none being created by the deeds on the property, implied under the statutes of this state, (Code §§ 108-106, 108-107), *or required by the constitution of the general church.*" 225 Ga. at 260. (Emphasis supplied). This court therefore left open the possibility of an implied trust in favor of a general church where factors other than the mere connectional relationship between a local and general church were present.

Reliance on such other factors was generally sanctioned by the United States Supreme Court in Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., supra. Since the Maryland Court of Appeals[11] had resolved the property dispute without "inquiry into religious doctrine," there was no violation of the First Amendment; hence, there was no federal question and the appeal was dismissed.

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10 The Eastern Heights Presbyterian Church acquired its property by deed from the Independent Presbyterian Church in 1930, naming as grantee "Eastern Heights Presbyterian Church, a religious corporation." Eastern Heights also held two other tracts: one, designated named individuals as "Trustees of Eastern Heights Presbyterian Church, and their successors in office"; the other, "for the use and benefit of the congregation of the Eastern Heights Presbyterian Church."

The property owned by the Hull Memorial Church named the church itself as grantee, and required that the property "be used as a place of worship by a church of the Presbyterian denomination known as the named church." 225 Ga. 261.

11 The Maryland Court of Appeals had decided this case prior to Presbyterian Church v. Hull Memorial Church, *supra*, on the same grounds, but the Supreme Court remanded the case for further consideration after Presbyterian Church. The Maryland court reaffirmed its decision which the Supreme Court then approved. 396 U.S. at 367 n.2.

The Maryland opinion, so approved, is thus instructive as to what "neutral principles of law," may appropriately be considered. It is especially so because Maryland, like Georgia since the *Presbyterian Church* case, has no implied trust doctrine. Maryland and Virginia Eldership of the Church of God v. Church of God at Sharpsburg, Inc., 241 A2d 691 (Md. 1968), remanded 393 U.S. 528, aff'd, 254 A2d 162 (1969), aff'd per curiam, 396 U.S. 367 (1970).

The Sharpsburg case involved competing claims to church property by the general Eldership and two local dissident churches that had been members of the Eldership. The court, in deciding the dispute, looked to the language of the deeds, applicable state statutes regarding religious corporations, the provisions in the Eldership constitution, and the corporate charters of the two local churches. The statutes[12] and Eldership constitutions[13] did not address the issue of church ownership, but the local charters placed ownership and control in the local congregations.[14] Therefore, the court held that the local churches owned the property.

It is thus apparent that as long as no inquiry is made into religious doctrine, statutes,[15] corporate charters,

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12 The statutes generally allowed trustees to own and operate the church property, unless statutes with more specific provisions have been specially enacted for the benefit of a particular denomination. 241 A2d at 696.

13 The Eldership constitution only provided for the reversion of local property to the Eldership if the church "becomes extinct or ceases to be." 241 A2d at 700.

14 The court decided that the Church of God was part congregational and part connectional in structure. 241 A2d at 703.

15 The general church may also have special laws passed in the state. Maryland and Virginia Eldership of the Church of God v. Church of God of Sharpsburg, 241 A2d 691 (Md. 1968), remanded 393 U.S. 528, aff'd, 254 A2d 162 (1969), *aff'd per curiam*, 396 U.S. 367 (1970).

the language in relevant deeds and the organizational constitutions of the denomination qualify as "neutral principles of law" as required by Presbyterian Church, supra. We will consider according to the case law developed above, the language of the deeds; relevant statutes, Code Ann. §§ 108-106, 108-107 and Code Ann. §§ 22-5507, 22-5508; and the general church constitution, the Book of Discipline of The United Methodist Church.[16]

As already mentioned, the 1852 deed conveyed the property to named individuals as "Trustees of the Methodist Episcopal Church at Mount Pleasant Academy" and their successors. Therefore, the deeds are materially indistinguishable from those in *Presbyterian Church*.[17]

No trust in favor of the general church may be implied under the general trust statutes, Code Ann. §§ 108-106, 108-107, where no funds are donated to purchase and develop the local church property by the general church. *Presbyterian Church*, 225 at 260. However, Code Ann. § 22-5507 recognizes and validates deeds conveying land for church purposes according to the limitations set out in the deed and for use "according to the mode of church government or rules of discipline . . . ." Where the conveyance is made to trustees, Code Ann. § 22-5508 provides that such trustees hold the church property "subject to the authority of the church or religious society for which they hold the same in trust. . . ."

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16 The Noah's Ark Church is unincorporated so there is no corporate charter to consider.

17 See note 10, supra.

The statutes thus mandate that the church property be held according to the terms of the church government. Since it is uncontroverted that the church was a connectional member of The United Methodist Church from its founding in 1852 until the trustees vote of withdrawal in 1969, there is no question that the trustees held the local church subject to The United Methodist Church and its "mode of church government or rules of discipline." Code Ann §§ 22-5507, 22-5508.

The Book of Discipline provides for local church property in section VII. Paragraph 1537 requires that "title to all real property now owned or hereafter acquired by an unincorporated local church, . . . shall be held by and/or conveyed to its duly elected trustees . . . and their successors in office, . . . in trust, nevertheless, for the use and benefit of such local church and The United Methodist Church. Every instrument of conveyance of real estate shall contain the appropriate trust clause as set forth in the Discipline (Par. 1503)." Book of Discipline, ch. 6. § VII, Par. 1537, p. 477, 478.

Paragraph 1503 sets out several clauses to be used in deeding church property which establish an express trust in favor of The United Methodist Church. The deeds to the Noah's Ark property did not originally contain such clauses, nor were any ever added. However, subparagraph 5 of paragraph 1503 provides that "the absence of a trust clause . . . in deeds and conveyances previously executed shall in no way exclude a local church or church agency from or relieve it of its connectional responsibility and accountability to The

United Methodist Church; *provided* that the intent and desires of the founders . . . are shown by any or all of the following indications: (a) the conveyance of the property to the trustees of a local church or agency of any predecessor to The United Methodist Church; (b) the use of the name, customs, and polity of any predecessor to The United Methodist Church in such a way as to be thus known to the community as a part of such denomination; (c) the acceptance of the pastorate of ministers appointed by a bishop or employed by the superintendent of the District or Annual Conference of any predecessor to The United Methodist Church." Book of Discipline, ch. 6, § I, Par. 1503(5), p. 461. Not only one, but all three of these indications are present in this case, as is abundantly clear from the record.

We therefore hold that an implied trust was intended by the founders of the Noah's Ark Methodist Church in favor of The United Methodist Church based on the "neutral principles of law" as set out above. In doing so, we agree with the reasoning of the Indiana Court in its recent decision of United Methodist Church v. St. Louis Crossing Independent Methodist Church, 276 NE2d 916, 52 ALR3d. 311, 323 (Ind. 1971), where it considered a similar church property dispute. That court said, "a local church if it desires to remain independent of the influence of a parent church body, must maintain this independence in the important aspects of its operation, e.g., polity, name, finances. It cannot, as here, enter a binding relationship with a parent church which has provisions of implied trust in its constitution, by-laws, rules, and other documents pertaining to the control of property, yet deny the existence of such relationship. It does not matter

whether such agreement to be bound is memorialized. A local church cannot prosper by the benefits afforded by the parent, participate in the functioning of that body, yet successfully disclaim affiliation when the parents acts to the apparent disadvantage of the local, so as to shield from equitable or contractual obligation the valuable property acquired by the local church either before or during such affiliation." *Accord*, Ohio Southeast Conference of Evangelical United Brethren Church v. Kruger, 243 NE2d 781 (Ohio 1968).

Thus convinced, we decline to be persuaded by Merryman v. Price, 259 NE2d 883 (Ind.) cert. denied, 401 U.S. 852 (1970), urged by the Noah's Ark church. In that case the Indiana court refused to look to the church discipline to settle a property dispute because it considered the discipline ecclesiastical in nature. Indeed, the Indiana court itself has not followed Merryman, but has distinguished it in the St. Louis Crossing case, supra, where it looked to non-ecclesiastical, property portions of the church discipline. The existence and presence in the record of the Book of Discipline, with its provisions on church property also distinguish this case from *Presbyterian Church*, 225 Ga. 259 (1969), cert. denied, 396 U.S. 1041 (1970). We therefore hold that the trial court did not err in granting summary judgment to The United Methodist Church on the issue of ownership of the church property.

2. Noah's Ark Methodist Church (Independent) asserts that the trial court erred in ruling that use of the local church name for their non-connectional organization unlawfully deprived The United

Methodist Church and its connectional local church of their identity and in enjoining that use. We affirm the decision of the trial court in enjoining the use of the name Noah's Ark Methodist Church (Independent) by the dissident church members on a motion for summary judgment.

It is well established that a court of equity will enjoin unfair use of the name of another.[18] *Love v. Brothers & Sisters of the Evening Star Society*, 120 Ga. 355 (47 SE 951) (1904); Purcell v. Summers, 145 F2d 979 (4th Cir. 1944). See Nims, Unfair Competition and Trademarks § 1. This protection also applies to unincorporated organizations and associations. " 'An association has a right to adopt a title by which it is to be known, the unauthorized use of which will be restrained by a court of equity.' 4 Cyc. 304, and authorities there cited." *Love v. Brothers & Sisters of the Evening Star Society*, supra at 355 n. 1. Accord, *Faison v. Adair*, 144 Ga. 797 (87 SE 1080) (1915).

In *Faison v. Adair*, supra, the court affirmed an injunction granted to the Ancient Arabic Order of the Nobles of the Mystic Shrine against the defendant Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine of North and South America, both voluntary associations. The standard is set out in that case: "The judge who heard the application for injunction found that the name adopted by the defendants was so similar to that of the plaintiffs that the natural

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18 We expressly decline to rule whether the Uniform Deceptive Trade Practices Act, Code Ann. § 106-7 applies here. Also, Code Ann. § 106-201 does not apply to unincorporated associations. *Faison v. Adair*, 144 Ga. 797 (87 SE 1081); *Methodist Episcopal Church, South Inc. v. Decell*, 60 Ga. App. 843 (5 SE2d 66) (1939).

tendency was and would be to confuse and mislead the public, and in consequence was a fraud and injury which the plaintiffs were entitled to enjoin . . . ." *Faison v. Adair*, supra at 799.

The local name of a church is "of great value, not only because business [is] carried on and property held in that name, but also because members associated with the name the most sacred of their personal relationships and the holiest of their family traditions." *Purcell v. Summers*, supra at 982. And, since "the right to use the name inheres in the institution, not in its members; . . . when they cease to be members of the institution, use by them of the name is misleading and, if injurious[19] to the institution, should be enjoined." *Purcell v. Summers*, supra at 987. Thus, the local members in defecting from the established church have given up their right to use the local church name. See, Grand Lodge Independent, Benevolent and Protective Order of the Elks v. Grand Lodge Independent, Benevolent and Protective Order of the Elks, Inc., 50 F2d 860 (4th Cir. 1931); First Independent Missionary Baptist Church of Chosen v. McMillan, 153 So2d 337 (Fla. 1963).

Noah's Ark Methodist Church (Independent), however, argues that the addition of (Independent) to the original name sufficiently distinguishes the new church from both the local Noah's Ark Methodist Church and the connectional organization, The United Methodist Church, while retaining the local identity of the original church. It is this very factor,

19 Actual injury need not be shown but only likely injury as a result of the confusion of the public. Nims, supra at § 313.

however, that creates the unfair confusion,[20] especially where the new church will be located in the same area as the old. Local residents who desire to become new members, wish to reestablish ties with the original church, or want to donate or leave a bequest to the original church affiliated with the connectional church might easily be misled to the detriment of both of these organizations.

The United Methodist Church presented evidence by affidavit that Noah's Ark Methodist Church has existed since 1852, that the name has always been attractively displayed on the church property and that the church is well known throughout the area as a connectional branch of The United Methodist Church. We find that this uncontroverted evidence is sufficient to sustain the injunction by summary judgment of the use of the words Noah's Ark Methodist Church (Independent). We therefore affirm the judgment of the court below on this issue. However, we express no opinion as to what name would sufficiently distinguish the new and the old local churches.

The trial court did not err in granting summary judgment to the plaintiffs. Since Noah's Ark obtained no certificate for immediate review on the denial of its motion for summary judgment, we do not consider it here. It is obvious, however, from our ruling here that its denial would have to be affirmed. The judgment of the court below is thus affirmed.

Judgment affirmed. All the Justices concur, except Nichols, C.J., Undercofler, P.J., and Jordan, J. who dissent.

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20 "The imitation need only be slight if it attaches to what is most salient." *Emory v. Odd Fellows*, 140 Ga. 423 (78 SE 922) (1913).

UNDERCOFLER, Presiding Justice, dissenting.

I respectfully dissent to the majority opinion.

It is my opinion that Presbyterian Church in the *United States v. Eastern Heights Presbyterian Church*, 225 Ga. 259 (167 SE2d 658) (1969) abolished the principle which implied a trust upon local church property for the benefit of the general church where there exists a connective form of government. Georgia has adopted what is known as the "formal title" doctrine. Essentially this limits a title inquiry to the relevant deeds and related documents. "Property Rights-Church Property," 52 ALR3d 324, 346. The deed here was delivered in 1852 to trustees for the "Methodist Episcopal Church at Mount Pleasant Academy." There is nothing in this deed or this record to indicate that any trust was established for any beneficiary other than the local church when this deed was delivered or thereafter.

I am authorized to state that Mr. Justice Jordan concurs in this dissent.